Supreme Court, U.S.
FILED
SEP 17 1986
F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985
No. 85-1835

(7)

CALIFORNIA,

Petitioner,

vs.

PETER ROONEY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT, DIVISION 7

ROGER S. HANSON, ESQ.
1517 E. Fourth Str.
Santa Ana, CA 92701
(714) 953-0638

ARTHUR LEWIS, ESQ.
205 S. Broadway, Suite 802
Los Angeles, CA 90012
(213) 624-4901

Members of the Bar, U.S. Supreme Court

EPHRAIM MARGOLIN, ESQ.
204 Stockton St., 3rd Floor
San Francisco, CA 94108
California Attorneys for Criminal Justice
and Attorneys for Respondent

36 pp

QUESTIONS PRESENTED

This case deals with the warrantless, non-probable cause, non-consensual, random search of the domestic garbage cans of this great nation - **millions** of garbage cans and bins.

Respondent notes with careful interest that the petitioner, State of California, dichotomizes two distinctly different issues in its first two questions presented:

(a) The issue of **reasonable expectation of privacy** in a domestic garbage can, vis-a-vis

(b) whether there is an "abandonment of property", under property law concepts, when garbage is placed in a trash/garbage can, such that the shallow analyzer is misled to conclude that the protection of the Fourth Amendment "does not apply" to any "abandoned" personal property.

CERTIFICATION AS TO INTERESTED PARTIES

Counsels for the Respondent hereby certifies that ther are no other parties of interest in the case at bar except those listed in the caption and their attorneys of record. These representatives are made to enable judges of the court to evaluate possible disqualifications or recusal.

TOPICAL INDEX

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI 1

ARGUMENT 8

THE REASONABLE EXPECTATION OF PRIVACY IN DOMESTIC GARBAGE CANS, TO SUGGEST THAT WARRANTLESS, NON-PROBABLE CAUSE, NON-PERMISSIVE SEARCHES WILL NOT BE MADE OF THEM, IS DISTINCTLY DIFFERENT THAN THE CONCEPT THAT "ABANDONED PERSONAL PROPERTY IS NOT ENTITLED TO PROTECTION UNDER THE FOURTH AMENDMENT." ALL UNITED STATES CIRCUIT COURTS AND SOME STATE COURTS THAT HAVE CONSIDERED THE QUESTION DO NOT FOCUS ON THE CORRECT ISSUE, BUT EMBARK ON THE ERRONEOUS TANGENT OF "ABANDONMENT" OF PERSONAL PROPERTY 8

CONCLUSION 25

TABLE OF AUTHORITIES

CASE PAGE(s)

Abel v. United States
362 U.S. 217 17

Aguilar v. Texas
378 U.S. 108 5

Arkansas v. Sanders
442 U.S. 753 ..... 14, 16, 17, 24

Bowers v. Hardwick
54 L.W. 4919 4

California v. Krivda
409 U.S. 33 5

Carroll v. United States
267 U.S. 132 10

Chambers v. Maroney
399 U.S. 42 10

Griswold v. Connecticut
381 U.S. 479 3

Illinois v. Gates
462 U.S. 213 5

Katz v. United States,
389 U.S. 347 23

Magda v. Benson
536 R.2d 971 (6th Cir. 1976)..... 14

People v. Edwards,
71 Cal.2d 1096 23

People v. Krivda
5 Cal.3d 357 ..... 15, 23

People v. Rooney
175 Cal.App.3d 634..... 2, 6

Preston v. United States
376 U.S. 364..... 10

Robbins v. California
453 U.S. 420..... 10, 24

Spinelli v. United States
393 U.S. 410 5

Stanley v. Georgia
394 U.S. 357 4

Terry v. Ohio
392 U.S. 1..... 6

United States v. Blok
188 F.2d 1019 (D.C. Cir. 1951)..... 18

United States v. Chadwick
433 U.S. 1 ..... 10, 13, 14, 16, 17, 24

United States v. Crowell
486 F.2d 1021 (4th Cir. 1978)..... 12

United States v. Dzialak
441 F.2d 212 (2nd Cir. 1971) 17

United States v. Kahan
350 F. Supp 784, 796..... 18

United States v. Leon (1984)
468 U.S. 104 S.Ct. 3405, 82 L.Ed.2d 677 4,20

United States v. Minter
312 F.2d 632 (3rd Cir. 1962)..... 16

United States v. Mustone
469 F.2d 970 (1st Cir. 1972) 15

United States v. Selby
573 F.2d 971, 973 (7th Cir. 1978)..... 13

United States v. Van Leeuwen
397 U.S. 249..... 4,20

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

NO. 85-1835

CALIFORNIA,

Petitioner,

vs.

PETER ROONEY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT, DIVISION 7

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the Respondent, PETER ROONEY, by his attorneys ARTHUR LEWIS and ROGER S. HANSON, members of the Bar, United States Supreme Court, and answers the Petition for Cert-

iorari filed by the Attorney General of California which requests review of that certain decision of the Court of Appeals of the State of California for the Second Appellate District entitled **People v. Rooney**, 175 Cal.App.3d 634 (1985), _____ Cal.Rptr._____, decided December 13, 1985.

The Supreme Court of California denied a Petition for Review on March 13, 1986.

This Honorable Court was petitioned for Certiorari by the People of the State of California, and this Court ordered a response.

This Response is filed by attorneys ARTHUR LEWIS and ROGER S. HANSON, and on behalf of the California Attorneys for Criminal Justice, a California statewide defense bar of which Attorneys LEWIS and HANSON are members, on behalf of Respondent PETER ROONEY.

The California Attorneys for Criminal Justice and its Amicus Curiae Brief Committee, chaired by Ephraim Margolin, Esq. of San Francisco, enters key cases in all of the California Courts, the Federal Circuit Courts, and the United States Supreme Court as attorneys Amicus Curiae when it is felt that significant key issues are presented for consequential adjudication.

The issue of **reasonable expectation of privacy in domestic garbage cans**, as opposed to the distinctly different, and erroneous, issue of

abandonment of personal property allegedly supporting no Fourth Amendment right, is an issue of national scope, and one that has been superficially and erroneously decided by the bulk of the United States Circuit Courts, largely because the above dichotomy and distinction has failed to have been recognized .

This case deals with the warrantless, non-probable cause, non-consensual, random search of the domestic garbage cans of this great nation - **millions** of garbage cans and bins.

Respondent notes with careful interest that the petitioner, State of California, dichotomizes two distinctly different issues in its first two questions presented:

(a) The issue of **reasonable expectation of privacy** in a domestic garbage can, vis-a-vis

(b) whether there is an "abandonment of property", under property law concepts, when garbage is placed in a trash/garbage can, such that the shallow analyzer is misled to conclude that the protection of the Fourth Amendment "does not apply" to any "abandoned" personal property.

Respondent, and counsel, urge that certiorari be denied because:

(1) the average citizen overwhelmingly believes that garbage/refuse/rubbage/trash consigned to **any** trash can or a communal trash bin, will be picked up by the duly designated garbage

collectors, and eventually burned/buried/lose its identity/destroyed at a common garbage dump, and that police, or their agents, will not intermediately scrutinize it, examine it, or otherwise investigate it for criminal purposes;

(2) this is a protection that the American citizen is willing to accept, and require, for many tell-tale highly personal articles are disposed of in the American garbage can, all the way from Kotex and Tampons, to used contraceptives (**Griswold v. Connecticut**, 381 U.S. 479) to mail containers that adult films arrive in at the home (**Stanley v. Georgia**, 394 U.S. 557 (1969) to love letters (**United States v. Van Leeuwen**, 397 U.S. 249) to empty vaseline containers, (cf. **Bowers v. Hardwick**, _____ U.S. _____, _____ L.Ed.2d _____, _____ S.Ct. _____ 54 L. W. 4919, (6/30/86) to the flotsam and jetsam of the ebb and flow of life itself, which the typical citizen does not want his police force learning of;

(3) this is a law enforcement technique of very dubious, and, in fact, non-existent value, for "garbage can roulette" can not be statistically optimistic, as the ratio of police to garbage cans must be miniscule, and hence the random search of garbage cans as a means of catching lawbreakers must be mathematically hopeless and overwhelmingly pessimistic;

(4) nothing, and no one, suggests that the **search warrant** should not reach the domestic garbage can should there be probable cause to issue one, and the constitutionally favored road to the search warrant has been immeasurably smoothed of obstacles and impediments with the advent of **Illinois v. Gates** (1983) 462 U.S. 213 supplantation of **Aguilar v. Texas** (1964), 378 U.S. 108 and **Spinelli v. United States** (1969) 393 U.S. 410, and the far-reaching, consequential, and epochal enunciations of **United States v. Leon**, 468 U.S._____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

(5) the manifold and multitude of honest and law-abiding garbage can users should not lose their Fourth Amendment, under their **reasonable expectation of privacy in their personal effects consigned to their garbage can**, solely to allow the relatively di minimis and molecular sized number of non-consensual, non-probable cause, nonconsensual garbage can searches, ultimately generating criminal prosecutions, to become and remain viable; it is a tragic and misplaced incursion on the many to attempt to get at the vanishingly few. In this respect it is to be noted that, in the entire nation, with federal and state cases combined, seemingly only some two dozen "garbage-can" cases have surfaced as reported decisions in the 15 odd years stretching from **California v. Krivda**,

409 U.S. 33 to **California v. Rooney** (1985-1986) (**People v. Rooney**, 175 Cal.App.3rd 634 (1985): thus garbage can cases herald an atomic sized percent of all of the reported cases dealing with the Fourth Amendment to the United States Constitution.

Thus, certiorari is sought on a principle of the Fourth Amendment covering a unique situation that can not statistically aid the nation's law enforcement officers in doing their job -- to bring to justice law breakers -- by making a case against them by the warrantless, non-probable cause, non-consensual search of their garbage can. In fact, this Court would **aid** law enforcement by directing it toward a more fruitful application of their time and monetary resources, rather than the **random search of garbage cans**, with its attending noisome and unpleasant ecological appurtenances, by the rapid denial of certiorari.

Concommitantly, this Court would strike a constitutional blow for logic -- that irrefutable logic is that 999 out of every 1000 United States Citizens now believes, with sound logic, that police will not be grovelling through the nation's garbage like hungry dogs in a random effort to secure some sort of evidence of crime. We emphasize, once again, that this case and this issue is **not** about the right to search a garbage can, supported by a search warrant, nor the **Terry v. Ohio**, 392 U.S. 1, **detention**

of a garbage can to enable police to secure a search warrant, where probable cause exists; the latter is **good** and **intelligent** law enforcement; the issue of this case -- may the nation's garbage cans be routinely and randomly searched without warrant, without probable cause, and without consent, without invading the **reasonable expectation of privacy** of the citizens of this great nation -- is the burning and paramount question for a freedom-loving nation, and a logical and scholarly court.

Certiorari should therefore be denied.

ARGUMENT

THE REASONABLE EXPECTATION OF PRIVACY IN DOMESTIC GARBAGE CANS, TO SUGGEST THAT WARRANTLESS, NON-PROBABLE CAUSE, NON-PERMISSIVE SEARCHES WILL NOT BE MADE OF THEM, IS DISTINCTLY DIFFERENT THAN THE CONCEPT THAT "ABANDONED PERSONAL PROPERTY IS NOT ENTITLED TO PROTECTION UNDER THE FOURTH AMENDMENT." ALL UNITED STATES CIRCUIT COURTS AND SOME STATE COURTS THAT HAVE CONSIDERED THE QUESTION DO NOT FOCUS ON THE CORRECT ISSUE, BUT EMBARK ON THE ERRONEOUS TANGENT OF "ABANDONMENT" OF PERSONAL PROPERTY.

A. Reasonable expectation of privacy is dictated by the fact that only someone with a wild imagination would believe that his daily garbage would possibly be picked over by police like hungry animals in search of food.

We accept the ever-present possibility that 4-legged members of the canine and feline species, rodents, and other scavengers may find intrigue and metabolic sustenance from a noisome garbage can; it is the 2-legged human wearing the police badge that the average American citizen does not

take into account as being interested in searching **his** garbage can.

In modern cities, ordinances usually foreclose the individual **burning** of refuse, and thus its fate is assigned to full-time and highly paid garbage haulers operating with modern and efficient trucks. The average homeowner believes that the fate of his garbage will be a rapid trip to the City dump where it will be buried or burned, and he does not expect that it will be picked over by police.

Thus, the garbage is "abandoned" only to garbage haulers, and not to the world in general, with no concern over what happens to it. The average citizen does not believe or expect, that police will rummage through the intimacies of personal life, be it discarded love letters, used tampons or contraceptives, discarded clothing, or any other similar articles.

In truth, all the citizens who think meaningfully on the subject expect reasonable privacy in the discharged garbage from their life processes.

B. Reasonable expectation of privacy is dictated by sheer statistics that make random, warrantless, non-probable cause, non-consensual searches of garbage cans a non-fruitful law enforcement tool.

The thinking individual is overwhelmed with the fact that the number of garbage cans in this nation overwhelms the available number of police

by many, many orders of magnitude; while the duty of the garbage can remains stalwart, unvarying, and steady -- to receive the refuse of the American home or business, the daily chores of our police vary from running down muggers and thieves to other less exciting activities, leaving very little time for bona fide "garbage can roulette".

It is important to note that the issue is not whether police can search a garbage can with a search warrant when probable cause exists to so do; of course they can and should, and, within the meaning of **United States v. Chadwick,** 433 U.S. 1 and **Arkansas v. Sanders**, 442 U.S. 753, and **Robbins v. California**, 453 U.S. 420, if a closed opaque bag within the garbage can is felt to affront the law, we perceive no reason why it can not be reduced to police custody, a warrant obtained for it, and it then be searched.

Thirdly, if it be perceived that the can is about to be whisked away by someone, it may well be that probable cause to believe it then contains contraband may support its immediate search pursuant to the "automobile exception" line of reasoning. **Chambers v. Maroney**, 399 U.S. 42; **Preston v. United States**, 376 U.S. 364; **Carroll v. United States**, 267 U.S. 132.

Finally, of course the can could be searched with **permission** of the owner, much as could a private home.

But it is equally evident that statistics overwhelmingly tell us that **random** or **speculative** search of garbage cans can not be a fruitful police tool.

Therefore, the logical thinker would expect privacy in **his** garbage can, much as the logical individual believes that, statistically, **his** trip on the highway will not end in an automobile accident, and **his** commercial airline flight will not end in death by aircrash.

Essentially then, both police **and** the citizen recognize the high statistical unlikelihood of successful police-contraband contact occurring on a given date, in a given city, by random police searches of garbage cans.

Mathematics dictates a reasonable expectation of privacy.

C. Along the above lines, reasonable expectation of privacy in a garbage can is privacy that society is, and should be, willing to allow; the hue and cry of the Courts hamstringing, tethering, and fettering the police does not make sense in random garbage can searches, and thus no one need feel that an efficient and needed law enforcement tool is being nullified.

D. The many United States Circuit Courts of Appeals which have considered the issue dispose of it on the non-analytical and terse conclusions that the garbage is "abandoned personal property",

and as to this "abandoned" property there can be no affront to the Fourth Amendment rights of its disposer should government agents seize it.

We suggest that such shallow lack of analysis misses the true question:

> "What does the average American Citizen believe will happen to his garbage when he places it out in his garbage can?"

We suggest that this question need not be answered here, for it is obvious what is **not** expected; that is, the police will not be expected to be searching through it for evidence of criminal acts committed by the placer of the garbage.

Respondent must acknowledge that many courts have afforded no reasonable expectation of privacy in garbage under a concept of abandoned personal property, each case presenting a variety of circumstances; **United States v. Crowell**, 586 F. 2d 1021, 1024-1025 (4th Cir. 1978)(police directed private contract trash collectors to turn over trash which had been collected from within defendant's **residence**; trash collectors "had no permission" to do this; the Court observed: "While most people probably expect that their garbage will **not** be inspected but rather will be taken to the dump, it is equally true that most people have no clear understanding of what happens to their garbage when it is removed from their premises and have even less

expectation of having anything further to do with it once it is removed. **The real question is whether there is a reasonable expectation of privacy that one's garbage will not be searched.**" 586 F.2d at 1025) Nonetheless, this Fourth Circuit Panel held that "**abandonment**" as a personal property concept foreclosed any further thoughtful analysis, without answering whether the defendant had reasonable belief that police would not be clandestinely contacting his private service garbage man to enlist his cooperation to effect a search of his closed opaque trash bag. In **Crowell**, supra, apparently police surveillance over a period of time led to the conclusion that a PCP synthesis laboratory was operating on the premises, thus foreclosing any contention that exigent circumstances existed to circumvent securing a search warrant for the home and its then internal garbage bag. The warrantless search of the closed, opaque trash bag, once reduced to police custody, would seem to violate the reasoning of **United States v. Chadwick**, 433 U.S. 1.

In **United States v. Shelby**, 573 F.2d 971, 973 (7th Cir. 1978) the F.B.I. requested the Milwaukee, Wisconsin garbage collectors to turn over closed, opaque bags taken from defendant's garbage cans from behind his home to enable the F.B.I. agents to search these bags for coin wrappers which would evidence that the defendant had been returning to

banks for which he had once been the janitor, via a retained key, and there had pilfered coins. The Seventh Circuit first ruled that the defendant had **standing** to object to the seizure of his garbage bags under the Fourth Amendment (573 F.2d at 973), but ruled that the concept of "abandonment" made any purported reasonable expectation of privacy a "bad judgment" on the part of the defendant. Here it would appear that no exigent cirumstances foreclosed securing a search warrant for the closed, opaque bags, once they were seized, within the reasoning of **United States v. Chadwick**, 433 U.S. 1 and **Arkansas v. Sanders**, 442 U.S. 753, as F.B.I. agents received information that the defendant was bringing substantial quantities of coins into local banks and depositing them.

In **Magda v. Benson**, 536 F.2d 111 (6th Cir. 1976), the defendant was suspected of United States post office burglary; surveillance of his home noted the defendant placing his apparently closed, opaque garbage bag on the "tree lawn" next to the street adjacent to his residence. The surveilling postal inspector later retrieved the bag and opened it without a warrant, although its reduction to the postal inspector's custody obviated any contention of "exigency", and allowed the leisurely securing of a warrant pursuant to **United States v. Chadwick**, 433 U.S. 1 and **Arkansas v. Sanders**, 442 U.S. 753. The District Judge had

ruled that **People v. Krivda**, 5 Cal.3rd 357, and its "interpretation of the U.S. Constitution by a California Court is not binding on this Court", and that "no legitimate expectation of privacy exists as to **abandoned** property " The Sixth Circuit Agreed.

In **United States v. Mustone**, 469 F.2d 970 (1st Cir. 1972), as early as March 3, 1971, U.S. Secret Service agents believed that the defendants were printing counterfeit money at a location in Lynn, Massachusetts, since they heard "the sound of an offset press in operation" while conducting a surveillance of the premises. Six days later, without securing a search warrant, surveilling U.S. Secret Service officers watched one defendant carrying two large "tied closed" opaque trash bags, and saw them placed on the sidewalk near some garbage cans "several doors away" from their place of operation. The agent seized the bags and took them to the Boston Secret Service office where they were leisurely opened the next day, and agents found impressions of three and one half counterfeit ten dollar notes and three aluminum offset plates stained with green ink. While **People v. Krivda**, 5 Cal.3d 357, was noted, the First Circuit held ". . . we are not persuaded by this authority, however, and hold that when Brennan deposited the bags on the sidewalk he **abandoned** them . . . Implicit in the concept of **abandonment** is a renunciation of any reasonable expectation of privacy in

the property abandoned... The contrary suggestion strikes us as anomalous . . ." (469 F.2d at 927).

This 1972 case, of course, preceded the "closed opaque container, reduced to police custody, requiring a search warrant to enter it" reasoning of **United States v. Chadwick**, 433 U.S. 1 and **Arkansas v. Sanders**, 442 U.S. 753.

In **United States v. Minker**, 312 F.2d 632 (3rd Cir. 1962), a wagering case, the defendant was suspected of running a gambling operation in Reading, Pennsylvania. Various "raids" conducted by the government on several of defendant's locations failed to turn up any evidence linking the defendant to the operation, although adding machines, numbers slips, tally sheets, and other indicia of the profession were uncovered. Eventually government agents arranged with one Damore, a trash collector, to permit them to examine the contents of a trash receptacle located on the premises of the defendant's apartment building, used by four tenants and the building superintendent. This step was more fruitful, for "handwriting identified as Minker's" appeared on some of the seized papers, which were leisurely examined off the situs by the agents. The 3rd Circuit held that Minker had "abandoned" this property, although acknowledging that "abandonment was largely a question of intent... and intent, in turn, is a question of fact . . . " The opinion did not disclose whether the paper was lying

in plain view within the communal bin, or was in repose within a closed, opaque bag in the bin.

In **United States v. Dzialak**, 441 F.2d 212 (2d Cir. 1971), company security investigators believed the defendant, a Railway Express employee, was pilfering articles entrusted to him for delivery, and set up a surveillance of his home; agents seized a closed, opaque cardboard box which was part of trash left between the sidewalk and street in front of the home; a second "trash" seizure occurred a week later. Each revealed incriminating evidence of articles shipped by Railway Express and apparently being diverted to the defendant's personal gain. While noting that local municipal ordinances precluded such rummaging into trash, the Second Circuit asserted that it was not "persuaded", because it was, to them. "abundantly clear that Dzialak **abandoned** the property", relying on **Abel v. United States**, 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960).

Of course, like many of the Federal Circuit cases, the seizure of the closed, opaque, cardboard box, and its reduction to police custody, with no inquiry whether a search warrant should be sought, preceded the analysis of **United States v. Chadwick**, 433 U.S. 1 and **Arkansas v. Sanders**, 442 U.S. 753.

Dzialak, of course, does not present the traditional Fourth Amendment problem since the **seizure** was by non-state, non-governmental agents, and is clearly thus distinguishable. Note, **U.S. v. Kahan**, 350 F.Supp. 784, 796, in this respect.

In **United States v. Kahan**, 350 F. Supp. 784 (D.C.S.D.N.Y. 1972), a much more thoughtful and scholarly analysis surfaced, rather than a resort to the facile and shallow "abandonment" route. There a government employee was suspected of criminal activity and his personal waste-basket, cached beneath his desk, was steadily and daily searched for whatever could be found to substantiate generation of federal criminal charges. The Court initially held that there were, indeed, searches, which the Fourth Amendment recognized, occurring, and nothing could support exigent circumstances to obviate getting a warrant, since they were done repetitively. (350 F.Supp. at 781, paragraph (5)).

Secondly, the Court held that Kahan's supervisor could not consent to the search of Kahan's wastebasket (350 F.Supp. at 793794), since Kahan had exclusive and personal use of the waste basket (cf. **United States v. Blok**, 188 F. 2d 1019, 88 U.S. App.D.C. 326 (D.C. Cir. 1951) where supervisor could not consent to search of government employee's desk).

The third issue was, and is, the omnipresent and ubiquitous "cop-out" of **abandonment** of anything deposited in the waste basket from the law of personal property.

The district judge, with uncommon erudition on the concept of "abandonment", characterized the issue thusly:

> " . . . the question is not whether there has been abandonment in the property law sense compare **Jones v. United States**, 362 U.S. 251, 265-267, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) with **Katz**, supra, 389 U.S. at 351-352, 88 S.Ct. 507, **but rather whether there has been abandonment of a reasonable expectation of privacy as to the area searched or the property seized** . . ." (350 F.Supp. 784 at 795).

The Court then proceeds to the nub of the entire garbage can search problem:

> "From this perspective, the flaw in the government's argument becomes immediately apparent. When Mr. Kahan threw papers in his wastebasket, he did "abandon" them **in the sense that he demonstrated an unequivocal intention to part with them forever.** However, **the undisputable expectation of an employee who discards items in his own wastebasket is that they subsequently will be**

disposed of and destroyed without prior inspection by others. In this respect, a wastebasket serves a similar function as the mails -- a wastebasket is a vehicle for destroying objects; a mailed package is a vehicle for sending them to someone else. In each case, the objects leave the possession of the person, **but his expectation that the vehicle in which they have been placed will be free from unreasonable governmental searches remains the same . . .**"

It has, of course, been held by this Honorable Court that a person does not give up his expectation of privacy with respect to letters and sealed packages when he deposits them in the mail. **United States v. Van Leeuwen**, 397 U.S. 249, 251-252, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970).

The Court noted, again with uncommon prescience, that

" . . . there is and can be no claim that Mr. Kahan's **wastebasket** was abandoned by him when he left his office in the evening after work. So long as he remained an employee with an assigned desk under which lay a wastebasket for his exclusive use, whether he was actually in the office at any particular time could not possibly affect his expectation of privacy with respect

to that receptacle . . ." (350 F.Supp. at 797).

Thus, by analogy, the only vessel possible for disposal of Mr. Rooney's trash, the apartment house dumpster, is not "abandoned" by Rooney nor any other user, and the concept of personal property "abandonment" totally misses the significant correct issue:

> "Does the depositor of trash give up, or abandon, his reasonable belief that the trash he places within the non-abandoned trash bin or container will not be scrutinized by police, or others at police direction, and does he still have the **reasonable expectation of privacy** in the ultimate fate of the trash, albeit the trash is abandoned in the personal property sense?"

Since Peter Rooney is, and was, an assigned user of the common **dumpster** for the apartment complex, he obviously has **standing** to object to its warrantless search.

The **Kahan** judge notes that, as we do,

> "Where the government believes that criminal prosecution of an employee is warranted, presumably it will have **probable cause** to believe that the employee has committed, or is committing a crime. In that case, if it has probable cause to conduct a Fourth Amendment search or seizure to obtain evidence of crime, **it can follow the**

warrant procedure..." (350 F.Supp. at 798).

Thus **Kahan** presents an uncommonly searching and scholarly analysis of the **true** issue of garbage can searches:

It is not the abandonment of the **trash** in the personal property sense that is at issue; indeed, the true issue is what does the American citizen reasonably believe will be the true fate of his trash, **which he has abandoned in the personal property sense, but not in the reasonable expectation of privacy sense?**

The distinction is, of course, the turning point and the key to erudite and correct analysis, and **scholarly decision**, as opposed to a facile, truncated, circumvented and shallow analysis, and **wrong decision.**

Virtually all cases which approve garbage can searches do so on the non-analytical launch-pad, and point of take-off, and route to cloudy thinking, that there is no "reasonable expectation of privacy" in "abandoned" personal property.

Such a path, urged by the State of California, sorely points out the dichotomy necessary for proper perspective of the "garbage can" search issue of the United States Constitution's Fourth Amendment.

The Supreme Court of California has, of course, recognized that California citizens have, and **believe** that they have, a **reasonable expectation of privacy** in domestic garbage cans; **People v. Edwards**, 71 Cal.2d 1096; **People v. Krivda**, 5 Cal.3d 357; This reasonable expectation of privacy is based on the reasonable belief that domestic garbage can contents will be picked up by either private or municipal garbage haulers, and will not be picked over/searched by police, or by police in cooperation with the licensed garbage haulers. The reasonable belief is that the contents of a domestic garbage can will be taken to a garbage dump where it will be burned/buried/mixed with other trash and become indistinguishable. The test, pursuant to **Katz v. United States**, 389 U.S. 347 is "whether the person has exhibited a reasonable expectation of privacy and, if so, whether that expectation has been violated by unreasonable governmental intrusion . . ."

". . . The prohibition in the 4th Amendment is against unreasonable searches and seizures, not trespasses . . . what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected" 389 U.S. 347, 351-352

as the California High Court reasoned, with logic,

> ". . . The placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public... Under such circumstances, we hold that defendants had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant . . ." (65 Cal.3d 357, 366-367).

Said again, a homeowner/business may "abandon" trash/refuse/garbage, but this "abandonment" is to garbage haulers who are not to be expected to be in liaison with police, and cooperating to allow police scrutiny of the average garbage can's contents.

That contents is usually, itself, contained in closed, opaque bags/containers, which, if thought to offend the law, may be reduced to police custody and a warrant sought.

In fact, the reasoning of **United States v. Chadwick**, 433 U.S. 1, **Arkansas v. Sanders**, 442 U.S. 753, and **Robbins v. California**, 453 U.S. 420 suggest that a reduction of the closed, opaque, brown garbage container found within the trash receptacle to police custody commands the securing of a warrant to enter it.

In the case at bar, respondent PETER ROONEY had placed his refuse within a brown, opaque, closed bag in the common trash bin, which was opened by the police to effect identification of its contents, and to identify ROONEY as the likely owner/contributor of the contents. That being the case, there is little that can be said in support of obviation of the warrant process.

CONCLUSION

Certiorari should be denied, because there is a reasonable expectation of privacy in domestic garbage cans, and warrantless, non-probable cause, non-consensual searches should not be sanctioned on the misguided theory that "abandoned" personal property leaves no Fourth Amendment protection to the once-owner of the garbage.

The reasonable expectation of privacy suggests that the citizen "abandons" his garbage solely and only to the garbage man, who is believed to be neither a police agent nor someone who will cooperate with scavenging police in a warrantless, non-probable cause, non-consensual search of a garbage can, closed opaque garbage bags either within or without the garbage can, its displaced and covered contents, or any other garbage can appurtenance.

Certiorari should be denied.

Respectfully and
logically submitted,

ARTHUR LEWIS, ESQ.

AND

ROGER S. HANSON, ESQ.

AND

CALIFORNIA ATTORNEYS
FOR CRIMINAL JUSTICE,

ATTORNEYS FOR
RESPONDENT
PETER ROONEY

STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, Respondent knows of no cases that are related to this appeal which are now pending before this court.

DATED: September 5, 1986.

ROGER S. HANSON, ESQ.
ARTHUR LEWIS, ESQ.
EPHRAIM MARGOLIN, ESQ.
Attorneys for Respondent

PROOF OF SERVICE

STATE OF CALIFORNIA)

) ss:

COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 7131 Mission Boulevard, Riverside, California 92509.

On September , 1986, I served the within RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI on the interested parties in said action by placing true copies in sealed envelopes with postage thereon fully prepaid in the United States mail at San Bernardino, California, addressed as follows:

Attorney General of Calif.
3580 Wilshire Blvd.
Los Angeles, CA 90010

Ephraim Margolin, Esq.
California Attorney for
Criminal Justice
240 Stockton 3rd Floor
San Francisco, CA 94108

Arthur Lewis, Esq.
205 S. Broadway, #802
Los Angeles, CA 90012

Clerk, Court of Appeal
3580 Wilshire Blvd.
Los Angeles, CA 90010

Clerk, Supreme Court of California
4250 State Building
Civic Center
San Francisco, CA 94102

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on September , 1986 at Riverside, California.

JACK GALLAGHER